Petition

81-1321

Office - Supreme Court, U.S.
FILED
JAN 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Petitioner,

—against—

FRITZ S. SINGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM M. KIMBALL
Counsel for Petitioner
233 Broadway
New York, New York 10007
(212) 962-7750

Question Presented

Can an injured harbor worker who is entitled to be compensated under the Federal Employees' Compensation Act have a valid damages claim against a shipowner if his injury was caused by unseaworthiness?

Contents

	Page
Question Presented	1
Parties	1
Opinion Below	1
Jurisdiction	2
Statute Involved	2
Statement	3
Reasons for Granting the Writ	4

Appendix

Court of Appeals Opinion	1a
District Court Findings and Conclusions	6a
Judgment	16a

Authorities

Cases

Aparicio v. Swan Lake, 643 F.2d 1109 (5 Cir. 1981)	4,6-8
Edmonds v. Compagnie Generale Transatl., 443 U.S. 256 (1979)	5
Fitzerald v. United States Lines, 374 U.S. 16 (1963)	5

Page

Kossick v. United Fruit Co., 365 U.S. 731 (1961). 10

Normile v. Maritime Co. of Philippines, 643 F. 2d 1380 (9 Cir. 1981). 4,6,8-9

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). . 5

Ryan Co. v. Pan-Atlantic Corp., 350 U.S. 124 (1956). 10

Sandoval v. Mitsui Sempaku K.K. Tokyo, 460 F. 2d 1163 (5 Cir. 1972). 8

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 5,8,10

United States v. Hutcheson, 312 U.S. 219 (1941). 6

United States v. Reliable Transfer Co., 421 U.S. 397 (1975) 7

United States Lines, Inc. v. United States, 593 F.2d 570 (4 Cir. 1979). 10

Constitution

Article III, Section 2 3

Page

Statutes

Federal Employees' Compensation Act, 5 U.S.C. 8101, et seq.. . .1,2,4

Longshoremen's and Harbor Workers' Compensation Act, Sec. 5(b), 33 U.S.C. 905(b). . . 2,5,7

28 U.S.C. 1254(1). 2
28 U.S.C. 1333(1). 3

Rules

F.R.App.P. 10(d) 3
F.R.Civ.P. 9(h) 3

Congressional Reports

H.R. Rep. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. and Adm. News, vol. 3. 6

S. Rep. 92-1125, 92d Cong., 2d Sess. (1972) 5-6

Parties

The caption on the petition cover contains the names of all parties to the proceeding in the Court of Appeals.

The caption, as do the captions in the Courts below, identifies petitioner Royal Netherlands Steamship Company by the English translation of its Dutch name, Koninklijke Nederlandsche Stoomboot Maatschappij BV. After the action was commenced, petitioner became and is a subsidiary of Koninklijke Nedlloyd Groep NV.

Opinion Below

Neither the opinion of the Court of Appeals nor the findings and conclusions of the District Court is officially or unofficially reported.

Jurisdiction

The judgment of the Court of Appeals dated October 15, 1981 was entered on November 6, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Statute Involved

Although respondent was properly compensated for his injury under the Federal Employees' Compensation Act, 5 U.S.C. 8101, et seq., this petition inferentially involves that part of Section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905(b), hereafter quoted:

"In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled

to recover damages by reason thereof, may bring an action against such vessel * * *. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred."

Statement

The admiralty and maritime jurisdiction of the District Court was based on Article III, Sec. 2 of the Constitution as implemented by 28 U.S.C. 1333(1) and F.R.Civ.P. 9(h).

The short F.R.App.P. 10(d) agreed statement of material facts is quoted in the Court of Appeals opinion (infra, pp. 2a-3a). In essence, respondent, a Panama Canal Company pilot, was injured while boarding petitioner's ship and, after being compensated for his

injury under the Federal Employees' Compensation Act, he sued and recovered damages from petitioner upon the District Court's conclusions that his injury was caused by unseaworthiness of the ship.

Reasons for Granting the Writ

The decision below, wherein the Fifth Circuit Court of Appeals felt bound to follow its previous decision in Aparicio v. Swan Lake, 643 F. 2d 1109 (5 Cir. 1981), concededly is in direct conflict with the intervening decision of the Ninth Circuit Court of Appeals in Normile v. Maritime Co. of Philippines, 643 F. 2d 1380 (9 Cir. 1981), on an important question of federal maritime law which has not been, but should be, settled by this Court pursuant to its "responsibility for fashioning the

controlling rules of admiralty law." Fitzgerald v. United States Lines, 374 U.S. 16, 20 (1963).

Congress enacted the Longshoremen's and Harbor Workers' Compensation Act in exercise of its paramount, constitutionally derived maritime jurisdiction, Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 256-260 (1977). As reobserved in Edmonds v. Compagnie Generale Transatl., 443 U.S. 256, 262 (1979), a primary purpose of 1972 amended Sec. 5(b), 33 U.S.C. 905(b), was to abrogate Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), which extended the seaworthiness warranty to workers covered by that Act. The 1972 amendment, particularly in light of the strongly expressed legislative intent, S. Rep. 92-1125, 92d

Cong. 2d Sess., (1972), pp. 8-11; H.R.Rep. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. and Adm. News, vol. 3, pp. 4702-4704, "must not be read in a spirit of mutilating narrowness", United States v. Hutcheson, 312 U.S. 219, 235 (1941), as does Aparicio v. Swan Lake, supra, and should be given "'hospitable scope' to Congressional purpose even when meticulous words are lacking", United States v. Hutcheson, supra, as does Normile v. Maritime Co. of Philippines, supra.

Although Aparicio confirms the Congressional goal "to overrule Sieracki", 643 F. 2d, p. 1115; acknowledges that "It was not unnatural for Congress to focus its effort to abolish the Sieracki - Ryan construct on the maritime workers covered

by the LHWCA, the workers who constituted the bulk of those to whom the Sieracki doctrine is applicable, without considering the fate of those relatively few Sieracki seamen not covered by that statute." 643 F. 2d, p. 1118; and quotes United States v. Reliable Transfer Co., 421 U.S. 397, 409 (1975), that "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime", 643 F. 2d, p. 1118, Aparicio illogically chooses to "Literally read" Sec. 5(b) and refuses "to go behind the statutory language" in an effort to preserve "judicially-built remedies as they apply to maritime workers not covered by the LHWCA, including * * * FECA - covered employees", 643 F. 2d, p. 1116, "remedies created by the Supreme Court as

they apply to maritime workers not covered by the LHWCA", 643 F. 2d, p. 1118.

But Sieracki was an LHWCA employee and it was the Fifth Circuit Court of Appeals, not this Court, which exported Sieracki to the Panama Canal Zone in Sandoval v. Mitsui Sempaku K. K. Tokyo, 460 F. 2d 1163 (5 Cir. 1972).

Normile gives more than lip service to principles which Aparicio merely iterates, and holds that "no longshoreman, whether publically or privately employed, can bring an unseaworthiness action", 643 F. 2d, p. 1381, reasoning that "With the demise of Sieracki went the right of an injured longshoreman to maintain a cause of action for unseaworthiness." 643 F. 2d, pp. 1381-1382.

"Plaintiff misconceives the evolution of the law. The Supreme Court

> gave private longshoremen absolute liability protection in 1946 with Sieracki. Between 1946 and 1972, public longshoremen asserted right analogous to those afforded private longshoremen. In the 1972 Amendments, Congress took away absolute liability for injured private longshoremen and substituted a workmen's compensation schedule. All that the Supreme Court gave, Congress took away. There remains no viable precedent to which plaintiff public employee can analogize. He has no cause of action.[2]"
>
> "[2].This conclusion does not leave plaintiff without adequate remedy. The Federal Employees' Compensation Act, 5 U.S.C. §§ 8101 et seq., entitles him as a federal employee to workmen's compensation virtually identical to that afforded by the Longshoremen's Act. Further, he can still recover from defendant under the Longshoremen's Act upon a showing of negligence.33 U.S.C. § 905(b)." 643 F. 2d, p. 1382.

Normile also refers to LHWCA legislative history which "evinces a desire for uniformity in the treatment of all longshoremen which plaintiff's position herein could only defeat", 643 F. 2d, p. 1383,

uniformity being an "imperative doctrine" of maritime law. Kossick v. United Fruit Co., 365 U.S. 731, 738 (1961).

It is additionally improbable that Congress intended to leave a small residue of government-employed Sieracki seamen if, as United States Lines, Inc. v. United States, 593 F. 2d 570 (4 Cir. 1979), holds, Congress' abolition of the concomitant Ryan Co. v. Pan-Atlantic Corp., 350 U.S. 124 (1956), doctrine precludes indemnity liability by the government employer.

Respectfully submitted,

WILLIAM M. KIMBALL
Counsel for Petitioner

New York, N. Y.
January 13, 1982

APPENDIX

COURT OF APPEALS OPINION

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-3975

Summary Calendar

FRITZ S. SINGER,

Plaintiff-Appellee,

M/V AMERSFOORT, her engines, boilers, tackle, rigging, etc., and ROYAL NETHERLANDS STEAMSHIP CO.,

Defendants-Appellants.

Appeal from the United States District Court for the District of the Canal Zone

---

(OCTOBER 15, 1981)

Before AINSWORTH, REAVLEY and RANDALL, Circuit Judges.

PER CURIAM:

The facts of this appeal, as transmitted to this court in an agreed statement of the parties, approved and certified by the district court, pursuant to F.R.A.P. 10(d), are as follows:

> Plaintiff-Appellee Singer, a transit pilot employee of the Panama Canal Company, was injured in 1977 while he was boarding the "M/V Amersfoort", owned by defendant-appellant Royal Netherlands Steamship Company, to pilot the ship through the Panama Canal when a rung of the ship's accommodation ladder broke as Singer was ascending the ladder at the Pacific anchorage of the Panama Canal. Singer received compensation under the Federal Employees' Compensation Act, 5 USC 8101, et seq. After a bench trial of Singer's action against Royal Netherlands Steamship Company to recover damages for his injury, the Court (Ross N. Sterling, D.J.) held in favor of Singer on his claim that the accomodation ladder was unseaworthy and against Singer on his claim that Royal Netherlands Steamship Company was negligent. The only issue presented for

review by the appeal of Royal Netherlands Steamship Company from the final judgment in favor of Singer is whether, as a matter of law, any relief could properly be granted on Singer's claim of unseaworthiness. Cf, Aparicio v. Swan Lake, 479 F. Supp. 1088 (D.C.Z. 1979), and Guevara v. Cia Sud Americana, 1978 A.M.C. 2000 (D.C.Z. 1978).

This circuit recently held in Aparicio v. Swan Lake, 643 F.2d 1109, 1118 (5th Cir. 1981), that "under circumstances in which the maritime worker is not covered by the [Longshoremen's and Harbor Workers' Compensation Act], the FECA employee may invoke the [Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946)] unseaworthiness action against vessel owner. . . ." Applying the Aparicio holding to the stipulated facts of this case, we affirm the district court's holding that Singer could recover on his claim of unseaworthiness.

We note the opinion of the Ninth Circuit in Normile v. Maritime Co. of the Philippines, 643 F.2d 1380, 1381 (9th Cir. 1981), holding that "no longshoreman, whether publicly or privately employed, can bring an unseaworthiness action." We are bound by the prior holding of this circuit in Aparicio, however, as this panel is "without power to overrule a decision of another panel." Ford v. United States, 618 F.2d 357, 361 (5th Cir. 1980). In so holding, we express no opinion as to the position adopted by the Ninth Circuit in Normile.

Royal Netherlands Steamship Company, recognizing that the panel would be bound by the prior decision in Aparicio, requested that this case be heard en banc, in light of the Ninth Circuit decision in Normile. No Judge of this Administrative

Unit in regular active service on the Court having requested that the Court be polled on hearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Hearing En Banc is DENIED, and the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE CANAL ZONE
BALBOA DIVISION

FRITZ S. SINGER, Plaintiff,	§	
v.	§	CIVIL ACTION NO. 78-10-B
M/V AMERSFOORT, Etc. and ROYAL NETHERLANDS STEAMSHIP COMPANY, Defendants.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial on March 25th and 26th, 1980, before the Court without a jury, with all the parties present in person or by counsel. After considering the pleadings, evidence, arguments and comments of counsel, the Court files herewith its Findings of Fact and Conclusions of Law.

Findings of Fact

1. Plaintiff, Fritz S. Singer, is a fifty-five year old former Panama Canal pilot, who, at all times material herein, was a transit pilot for the Panama Canal Company (now Commission), a corporate agency of the United States, and a resident of the Canal Zone.

2. The M/V AMERSFOORT is an ocean-going vessel engaged in commerce owned and operated by the Royal Netherlands Steamship Company, a foreign corporation, which, on June 26, 1977, was carrying freight and passengers on a voyage transiting the Panama Canal, Pacific to Atlantic.

3. Plaintiff, within the scope and duty of his employment, arrived at the portside of Defendant vessel aboard the Panama Canal launch MAKO and stepped on to

the awaiting accommodation ladder. From the evidence adduced, it is clear that the accommodation ladder, an integral part of the ship, was defective and not fit for its intended purpose. As Plaintiff ascended the ladder, the fifth or sixth rung broke and fell into the sea.

4. When the ladder rung broke, Plaintiff fell and struck his groin, lower back and left leg. Plaintiff noted the incident on the ship's data card after he completed his duty that day.

5. Plaintiff testified that he experienced pain, but did not think it severe. When the pain persisted and became more acute, he saw Rolando Chanis, M. D., at Clinica Paitilla in Panama City on August 10, who immediately hospitalized him for twelve days.

6. For the following twenty-two months, Plaintiff worked intermittently for his employer, and, when he was not working, received temporary disability compensation from the agency under the provisions of the Federal Employees' Compensation Act (FECA), 5 U.S.C., Chapter 81. His total compensation pay over the period was $33,391.58, for which, together with $5,148.95 in medical expenses and costs, his employer asserts its subrogated lien. After June 2, 1979, disability compensation under this plan ceased and, in January, 1980, Plaintiff was found by his employer to be unfit for continued employment as a Canal pilot by reason of his degenerative disc condition. He was thereupon recommended for retirement with an annuity based on his years of completed employment of $7,500.00.

7. Although there is evidence that Plaintiff has a pre-existing degenerative disc condition in his back before the accident, there is no evidence that that condition caused him any difficulties prior to his fall on June 26th. In a March 28, 1979, report Dr. Theodore Goldstein indicated that it would be unusual for the Plaintiff not to have had some history of low back discomfort. However, there is neither evidence of such a prior history nor evidence that Plaintiff's condition limited him in any manner. The preponderance of the medical evidence leads to the conclusion that Plaintiff's fall of June 26, 1977, aggravated a pre-existing, but dormant, back condition, and has accelerated significantly the consequences of that condition.

8. But for the fall, Plaintiff would have been able to continue working as a transit pilot until age 62.

9. The preponderance of medical evidence leads to the conclusion that Plaintiff cannot perform the duties of a Panama Canal pilot or other responsible sea duties, but is capable of performing jobs involving "light work". Mr. Singer testified that in addition to the intermittent pilot work he was able to do after the fall, he also did some consulting work and now anticipates going into business with a friend after this trial. Based on this Court's evaluation of Plaintiff's work history before and after his incident, and of the medical testimony, this Court finds that the Plaintiff has suffered a partial loss of his capacity to earn money as a result of the fall.

10. At the time of his accidental fall, Plaintiff was earning about $35,000 a year. Plaintiff has lost wages as a result of the fall in the amount of $72,000, which represents the amount he would have earned as a pilot less what he actually earned during that period and a pro rata portion of the annuity he has received in 1980. The Court notes that Plaintiff received $33,391.58 in disability compensation under the FECA for which he is required to reimburse his employer for the period August 11, 1977, to June 2, 1979.

11. Plaintiff has suffered medical expenses and costs and is required to reimburse the paying agency under the FECA in the sum of $5,148.95.

12. Plaintiff has suffered a partial loss of future earnings capacity

and a reduction in the amount of his future retirement annuity payments in the present sum of $50,000.

13. Plaintiff is awarded $15,000 to compensate him for his pain and suffering, past and future.

Conclusions of Law

1. That the Court has jurisdiction of the subject matter and of the parties of this maritime cause.

2. The M/V AMERSFOORT, its owners and operators, owed Plaintiff, on June 26, 1977, a seaworthy vessel and safe avenue of ingress and egress.

3. The M/V AMERSFOORT was unsafe and unseaworthy by virtue of a defective accommodation ladder not reasonably suited for its intended purpose and that the said unseaworthiness was the proximate

cause of injuries sustained by Plaintiff on June 26, 1977. See, Usner v. Luckenbach Overseas, 400 U.S. 494, 91 SCt 514 (1971), Law v. Sea Drilling Corp., 510 F.2d 242 (5th Cir., 1975), and Martinez v. Dixie Carriers, 559 F.2d 457 (5th Cir., 1976).

4. The evidence failed to establish that Defendant was negligent in any respect with regard to the step.

5. The Plaintiff was not a fault nor did he contribute in any way to his injuries sustained aboard Defendant vessel on June 26, 1977.

6. In accordance herewith, Defendants are liable to Plaintiff for lost income, future lost income and retirement benefits, pain and suffering, and medical expenses borne by Plaintiff's employing agency as subrogated through Plaintiff under 5 U.S.C. §8132.

WHEREFORE, it is

ORDERED, ADJUDGED and DECREED that Defendants shall pay Plaintiff the sum of $142,148.95 as general and special damages, plus the costs of this action, and interest hereon as allowed by law and it is further

ORDERED that the Clerk of this Court shall issue judgment for Plaintiff herein in accordance with the above and the Rules of this Court.

DONE at Houston, Texas, this 16th day of July, 1980.

/s/ Ross N. Sterling
United States District Judge

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-3975

Summary Calendar

D. C. Docket No. CA-78-0010-B

FRITZ S. SINGER,

Plaintiff-Appellee,

versus

M/V AMERSFOORT, her engines,
boilers, tackle, rigging, etc.,
and ROYAL NETHERLANDS STEAMSHIP CO.,

Defendants-Appellants.

Appeal from the United States District Court for the

District of the Canal Zone

Before AINSWORTH, REAVLEY and RANDALL,

Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Canal Zone, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

OCTOBER 15, 1981

Issued as Mandate: NOV - 6 1981

Opposition

Office - Supreme Court, U.S.
FILED
FEB 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1321

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ROYAL NETHERLANDS STEAMSHIP COMPANY,
Petitioner,

v.

FRITZ S. SINGER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DANIEL D. DOUGLASS
Post Office Box 418
Fort Lauderdale, Florida 33302
(305) 564-4448
Counsel for Respondent

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTION PRESENTED

Has an injured Panama Canal pilot who received compensation and medical treatment under the FECA been precluded from recovery of damages for an unseaworthy vessel as a result of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES ii
PARTIES 1
OPINIONS BELOW 1
JURISDICTION 1
STATUTES INVOLVED 2
STATEMENT 2
REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI 2

TABLE OF AUTHORITIES

Cases:

Aparicio v. Swan Lake, 643 F.2d 1109 (5th Cir. 1981) 3
Brady v. Roosevelt Steamship Co., 317 U.S. 575 (1943) 3
Edmonds v. Compagnie Generale Transatl., 443 U.S. 256 (1979) 4
Fitzgerald v. United States Lines, 374 U.S. 16 (1963) 3
Normile v. Maritime Co. of Philippines, 643 F.2d 1380 (9th Cir. 1981) 3
Panama Agencies Co. v. Franco, 111 F.2d 263 (5th Cir. 1940) 3
Pinto v. Vessel "Santa Isabel", 492 F. Supp. 689 (D.C.Z. 1980) 3
Ryan Co. v. Pan-Atlantic Corp., 350 U.S. 124 (1956) 4
Sandoval v. Mitsui Sempaku K.K. Tokyo, 460 F.2d 1163 (5th Cir. 1972) 3, 4
Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 3

Statutes. *Page*

Federal Employee's Compensation Act, 5 U.S.C. 8101, *et seq.* 2, 4

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.* 2, 3, 4

Regulations:

35 C.F.R. 105.6 2

Rules:

F.R.App.P. 10(d) 2

Congressional Reports:

H.R. Rep. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. and Adm. News, vol. 3 3

S. Rep. 92-1125, 92d Cong., 2d Sess. (1972) 3, 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROYAL NETHERLANDS STEAMSHIP COMPANY,

Petitioner,

v.

FRITZ S. SINGER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PARTIES

Party respondent is the same as captioned, appearing identically in the courts below.

OPINIONS BELOW

Both opinions below are unreported but have been set forth verbatim in the appendix to the Petition for Certiorari, and are not herein set forth again.

JURISDICTION

Respondent has no objection to the statement of jurisdiction set forth in the Petition.

STATUTES INVOLVED

Petitioner claims the petition "inferentially involves" the Longshoremen's and Harbor Workers' Compensation Act, as amended by Public Law 92-576. While the cases cited herein and in the Petition acknowledge a relationship, Respondent is not entitled to the benefits of that legislation by specific exclusions of §§ 1 and 3 thereof. 33 U.S.C. § 901, *et seq.* As an employee of an agency or instrumentality of the United States, 5 U.S.C. § 8101 *et seq.* governs the rights and duties of Respondent.

STATEMENT

Respondent generally adopts the statement of Petitioner incorporating the agreed statement of material facts of the parties at the Court of Appeals pursuant to Rule 10(d), F.R.App.P., and set forth in appendix of Petition. At the time of his injury Respondent was boarding Petitioner's vessel whereupon he would assume control of the navigation and movement of such vessel through a Canal transit. That portion of compensation benefits to which Respondent became entitled was received under Chapter 81, Title 5, United States Code, and is payable from Respondent's recovery under the provisions of 5 U.S.C. § 8132.

REASONS FOR DENYING PETITION FOR CERTIORARI

Petitioner characterizes Respondent as a harbor worker, creating an atmosphere of interrelationship to the LHWCA, proposed by Petitioner as "inferentially" involved. Respondent was a Panama Canal transit pilot. The LHWCA has no application to his status or situs. Pursuant to 35 C.F.R. 105.6, he is master of navigation of the vessel for the course of its Canal transit. Presum-

ably, only the temporary nature of his employment aboard Petitioner's vessel renders him less than a seaman. Certainly, Petitioner's vessel was in nvaigation and Respondent's status aboard was to aid in navigation. The LHWCA does not extend to the master of any vessel, § 3(a)(1), 33 U.S.C. 901, *et seq.*, nor to any employee of the United States or any agent thereof, § 3(a)(2), 33 U.S.C. 901, *et seq.* Respondent's injury occurred at the Pacific anchorage of the Panama Canal, requiring an extraterritorial application of the LHWCA, heretofore rejected in *Panama Agencies Co. v. Franco,* 111 F.2d 263 (5th Cir. 1940). Notwithstanding three bases for the inapplicability of the LHWCA, Petitioner would invoke the inferences of the LHWCA to preclude recovering damages on long established and familiar principles. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946); *Sandoval v. Mitsui Sempaku K.K. Tokyo,* 460 F.2d 1163 (5th Cir. 1972) Admiralty law is to a large extent judicially created. *Fitzgerald v. United States Lines,* 374 U.S. 16 (1963). If Congress intended to abrogate common law, it would have done so in clear, unambiguous terms. *Brady v. Roosevelt Steamship Co.,* 317 U.S. 575 (1943) at 581. Nowhere in the House and Senate Reports or in the Amendments is there any indication the legislation was intended to affect the rights and duties of persons not covered by the LHWCA. H.R. Rep. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. and Adm. News, vol. 3; S. Rep. 92-1125, 92d Cong., 2d Sess. (1972); *Aparicio v. Swan Lake,* 643 F.2d 1109 (5th Cir. 1981) at 1116; *Pinto v. Vessel "Santa Isabel",* 492 F. Supp. 689 (D.C.Z. 1980) at 693-5.

Petitioner notes the conflict between the Fifth and Ninth Circuits in *Aparicio, supra,* and *Normile v. Maritime Co. of Philippines,* 643 F.2d 1380 (9th Cir. 1981). The legislative history of the 1972 Amendments does

not support *Normile*'s interpretation of § 905(b). The removal of the shipowner's liability for unseaworthiness occurred as a concomitant of ending liability under the stevedore's warranty of workmanlike service, which was a *quid pro quo* for increasing the compensation benefits. S. Rep. 9–10; *Edmonds v. Compagnie Generale Transatl.*, 443 U.S. 256 (1979) ff at 1175. The principal object of the 1972 Amendments focused on the third party indemnity principles of *Ryan Co. v. Pan-Atlantic Corp.*, 350 U.S. 124 (1956); *Edmonds* at 1173. Moreover, Congress enacted Public Law 93–416, modifying 5 U.S.C. § 8132, on September 7, 1974, without material revision in any substantive particular of Federally-compensated employees' third party actions, certainly without mention of the abrogation of the Respondent's rights to recover in this case.

Petitioner has shown no special or important reasons why the writ should be granted nor any overriding public interest. Respondent is entitled to shipowner's warranty of seaworthiness. *Sandoval v. Mitsui Sempaku K.K. Tokyo*, 460 F.2d 1163 (5th Cir. 1972). For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

DANIEL D. DOUGLASS
Post Office Box 418
Fort Lauderdale, Florida 33302
(305) 564-4448
Counsel for Respondent

February 12, 1982